

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KELLY R. ANDERSON**  
Claimant

VS.

**UNITED PARCEL SERVICE, INC.**  
Respondent

AND

**LIBERTY MUTUAL INSURANCE CO.**  
Insurance Carrier

Docket No. 1,038,811

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the December 27, 2013, Award on Remand entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on April 15, 2014. Angela D. Trimble of Kansas City, Kansas, appeared for claimant. Jeffrey D. Slattery of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant met with personal injury arising out of and in the course of her employment with respondent on February 1, 2006. The ALJ found claimant's impairment was limited to 20 percent to her right upper extremity at the level of the shoulder and 10 percent to her left upper extremity at the level of the shoulder. The ALJ ordered claimant's reimbursement by respondent of unauthorized treatment by Dr. Edward Prostic up to the statutory maximum and reimbursement of prescriptions related to treatment with Dr. Lowry Jones upon proper presentation.

The Board has considered the record and adopted the stipulations listed in the Award on Remand.

**ISSUES**

Claimant argues the ALJ erred in holding she is not permanently and totally disabled from her injuries. In the alternative, claimant contends she is entitled to a work disability.

Respondent maintains there is no medical evidence to support claimant's claim for permanent total disability and no medical records to support a neck injury or bilateral carpal tunnel syndrome; therefore, respondent argues the ALJ's findings should be affirmed.

The sole issue for the Board's review is: What is the nature and extent of claimant's disability?

### **FINDINGS OF FACT**

The Board adopts the factual and procedural overview set forth by the Board's Findings of Fact as written in the Board's Order of June 14, 2013.<sup>1</sup> This matter was remanded to the ALJ by the Board on June 14, 2013, with directions to address the issues of how he assessed weight to the medical evidence, the presumption of permanent total disability, and whether respondent produced evidence sufficient to rebut the presumption.

The ALJ found claimant's impairment was limited to 20 percent to her right upper extremity at the level of the shoulder and 10 percent to her left upper extremity at the level of the shoulder based upon the ratings of Dr. Jones, claimant's treating physician. The ALJ determined the testimony of Dr. Jones was more persuasive than that of Dr. Prostic, who did not provide treatment and rated claimant for carpal tunnel and cervical spine issues despite negative diagnostic testing results of those areas. The ALJ found:

This finding creates a presumption that the claimant is permanently and totally disabled. Dr. Jones addresses this issue in his testimony. Based on the restrictions that he provided, he did not find the claimant permanently and totally disabled from work. (Jones p. 15) Steve Benjamin, the respondent's vocational expert, testified that the claimant would be able to re enter the open labor market. (Benjamin Exhibit 2, p. 4) Jerry Hardin, the claimant's vocational rehabilitation expert, testified that it was his opinion that based on Dr. Prostic's restrictions, the claimant was permanently and totally disabled, that testimony is discredited by Dr. Prostic who testified that the claimant was capable of more than light duties. (Prostic p. 32) The court finds that the weight of this evidence overcomes any presumption that the claimant is permanently and totally disabled.<sup>2</sup>

### **PRINCIPLES OF LAW**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends. "'Burden of proof' means the burden of a party to persuade the trier of facts

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<sup>1</sup> *Anderson v. United Parcel Service, Inc.*, No. 1,038,811, 2013 WL 3368472 (Kan. WCAB June 14, 2013).

<sup>2</sup> ALJ Award (Dec. 27, 2013) at 3-4.

by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>3</sup>

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.

K.S.A. 44-510c(a)(2) (Furse 2000) states, in part:

Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability.

Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment. An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."<sup>4</sup>

### ANALYSIS

Two physicians provided deposition testimony in this claim. Dr. Prostic provided impairment ratings for claimant's upper extremities and cervical spine, which, coupled with a wage loss, could result in work disability under K.S.A. 44-510e. Dr. Jones provided an impairment rating for each shoulder, creating a presumption of permanent total disability under K.S.A. 44-510c(a)(2) .

The ALJ found the opinions of Dr. Jones more persuasive than the opinions of Dr. Prostic. The ALJ found respondent successfully rebutted the presumption of permanent total disability based upon the restrictions provided by Dr. Jones and the vocational opinions of Mr. Benjamin. The Board agrees with the ALJ's conclusions.

The ALJ's reliance on Dr. Jones is sound. Dr. Jones provided treatment for over three years and was in a better position to assess claimant's ability to function. Dr. Jones treated claimant only for injuries to her shoulders. No medical evidence was placed in the record to support claimant suffered a neck injury prior to Dr. Prostic's examination. Dr. Prostic specifically noted no neck abnormality in his 2008 examination report.<sup>5</sup>

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<sup>3</sup> K.S.A. 2005 Supp. 44-508(g).

<sup>4</sup> *Wardlow v. ANR Freight Systems*, 19 Kan.App.2d 110, 113, 872 P.2d 299 (1993).

<sup>5</sup> Prostic Depo., Ex. 2 at 2.

The first notation of a neck injury is found in Dr. Prostic's 2011 report, six years after the date of accident and five years after claimant stopped working for respondent. In his 2011 report, Dr. Prostic opined claimant sustained repetitious injuries to her cervical spine and upper extremities through her last day worked. Dr. Prostic's opinion is inconsistent with his statement that he did not know the date claimant last worked for respondent.<sup>6</sup> Claimant has failed to prove she suffered a neck injury arising out of and in the course of her employment.

Based upon on the evidentiary record, claimant has proven she suffers a 20 percent impairment to the right shoulder and a 10 percent impairment to her left shoulder resulting from repetitive trauma arising out of and in the course of her employment with respondent. K.S.A. 44-510c(a)(2) creates a rebuttable presumption in favor of permanent total disability when, as the result of a work-related injury, a claimant experiences a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof. "If the presumption is not rebutted by evidence in the record, . . . compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c as a permanent total disability."<sup>7</sup> A person is permanently and totally disabled when he or she is "essentially and realistically unemployable."<sup>8</sup>

The Board finds the opinions of Dr. Prostic to be unreliable in this case. As such, the Board adopts the permanent restrictions assigned by Dr. Jones. The only vocational opinion relating to the issue of whether claimant is essentially and realistically unemployable based upon Dr. Jones' restrictions was provided by Mr. Benjamin. Mr. Benjamin opined claimant is capable of earning \$321.17 per week in the open labor market. While the evidence supports a finding claimant is unable to make a wage comparable to her earning with respondent, she is employable.

### **CONCLUSION**

Claimant failed to meet the burden of proving she suffered a neck injury arising out of and in the course of her employment with respondent. Claimant has proved she suffered an injury by repetitive trauma to both upper extremities. Respondent successfully rebutted the presumption of permanent total disability.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award on Remand of Administrative Law Judge Thomas Klein dated December 27, 2013, is affirmed.

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<sup>6</sup> Prostic Depo. at 21.

<sup>7</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 529, 154 P.3d 494 (2007).

<sup>8</sup> *Wardlow v. ANR Freight Systems*, 19 Kan.App.2d 110, 113, 872 P.2d 299 (1993).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Thomas Klein, Administrative Law Judge